No. 4486

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT 16

LAWRENCE MONZETTI, PETE GAIDO, BATT TAMIETTI, JOHN PAGLERRO, and FRANK TAMIETTI,

Cross-Plaintiffs in Error.

vs.

CRYSTAL COPPER COMPANY, a Corporation,

Cross-Defendant in Error.

CROSS-PLAINTIFFS IN ERROR'S BRIEF

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UPON CROSS-WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA

STATEMENT OF THE CASE

This is a case by a mining partnership, consisting of five members, to-wit: Lawrence Monzetti, Pete Gaido, Batt, Tamietti, John Pagleero, and Frank Tamietti, a-ginst the Crystal Copper Company, a corporation, to re-

cover damages under two causes of action. The first cause of action is brought to recover damages under an oral mining lease against said corporation for ejecting and keeping three of said co-partners from going on with their work under said sub-lease. (Tr. 2-13) The second cause of action is brought to recover damages for the conversion by said corporation of corporation shares of stock belonging to plaintiffs in the said corporation. (Tr. 13-26)

On the first cause of action there was a verdict for two of the co-partners, to-wit, Batt Tamietti and Pete Gaido in the sum of $770.66 each. (Tr. 40). As to the other three co-partners, there was no verdict of any kind. Judgment was entered on the said verdict. (Tr. 41).

On the second cause of action, a motion for an instructed verdict in favor of said corporation was granted. (Tr. 181-185).

The said corporation has brought this case into this Court on a Writ of Error.

The said Batt Tamietti and Pete Gaido filed a petition for a Cross-Writ of Error, and such a Cross-Writ was issued. In support of said Cross-Writ, this Brief is filed. At the time said Cross-Wit of Error was issued, an order was made that the Transcript filed by the said coroporation in connection with its Writ of Error, is to be used for the consideration of said Cross-Writ of Error. A reference to a transcript in this Brief, is a reference to said transcript of record.

The amended complaint as to the first cause of action shows, that on June 26th, 1921, the said copartners sec-

ured an oral mining sub-lease from the said coroporation on a certain portion, below the 500-foot level of the Goldsmith Mine near Butte, Montana. The Goldsmith mine extends in an easterly and westerly direction 1500 feet, and 600 feet in width. There had been a winze formerly sunk from the said 500-foot level, on an incline of about 35 degrees in a southerly direction in the North lead of said mine to a depth of about 30 feet, about 1000 feet northwesterly from the main shaft of said Mine. Said North Lead is extending in an easterly and westerly direction. The said co-partners secured an oral lease from the said corporation on the following terms:- They were to sink the said winze to the depth of 50 feet below the 500-foot level, and any vein of commercial ore they would discover, if any, in that distance, they were to have the exclusive right to follow to the boundries of said mine, if it extended that far, and up to the 500-foot level, if it extended that far up, and to have the exclusive right to mine and extract the commercial ore there-from on paying certain royalties; the said corporation was to furnish the tools, explosives and timber, and was to hoist all the ore and waste the said lessers would bring to said main shaft of said mine, and it was to furnish the power to run the mining drills and the pumps to pump the water from the place where the said leasers were working, and was to hoist and lower the said leasers and their employees from and to the said 500-foot level when going to and from work and when otherwise necessary; from the ores shipped by the said lessees under the said sub-lease, the following deductions were

to be made, to-wit:

> "Freight charges on all the ores shipped to the smelter, and on all ores assaying up to $25.00 per ton, 11 1-2 per cent royalty; from $25.00 to $50.00 per ton 23 per cent royalty; from $50.00 to $100.00 per ton, 34 1-2 per cent royalty; from $100.00 to $200.00 per ton 46 per cent royalty; from $200.00 and up per ton 57 1-2 per cent royalty to the owner of the Goldsmith Mine, and 50 per cent of the net balance was to go to the plaintiffs and 50 per cent to the defendant." (Tr. 6).

Four of the said co-partners started to work under said lease in the evening of June 26th, 1921, and continued to work daily until the 20th day of July, 1921, when they struck ore of commercial value at the depth of about 48 feet below the 500-foot level. The fifth partner, Frank Tamietti, who had claimed to have been sick, became well and started to work also. At this time the said Co-partnership and the said corporation agreed on an extension of territory in depth to be developed by the co-partners, on the same terms and conditions as the original sub-lease. They then followed the vein of commercial ore to the depth of about 75 feet, when they struck a fault, cutting off the vein on the west. They then ceased sinking the winze except for sinking a sump to hold the water between shifts and so the water could accumulate, so that the pumps would not have to be operating all the time. They then drifted easterly on the said vein of commercial ore which was on the average, between three and four feet wide, and pitching at an angle of about 45 degrees north. They

drifted along said vein for a distance of about one hundred feet. At about 100 feet from the said winze, the said vein was broken up and ceased to be of commercial value. As they cut the drift along on said vein, they timbered it and put in ore chutes and slides to catch and carry the ore there-after stoped, down from said vein, into ore cars or other recepticals at the said ore chutes. In sinking the winze in commercial ore, and cutting the said drift in commercial ore, shipments thereof were made showing values of about $81.00 per ton, in gold and silver. They then stoped down from the vein of commercial ore near the winze, an area of about 20 feet high by 20 feet long, which ore was shipped and showed the same value as aforesaid.

The said leasers were granted additional territory to what they had exposed of commercial value. The additional territory granted was to be on the same terms and conditions as the original sub-lease. This additional territory granted, was, they were to cross-cut northerly into the foot wall of the said North Lead, to look for a foot wall lead, and they were to have all the commercial ore up to the 500-foot level and to the boundries of said mine, if any commercial ore was discovered and continued within said area. They cut a cross-cut of about 15 feet when they struck what was called the foot-wall lead, on the average of about 3 feet wide and assaying $44.00 per ton in silver and gold. It was estimated that there was left in the hanging wall lead, up to the 500-foot level about 1000 tons of the value of about $81.00 per ton, which could have been mined in about 30 days, at a net

profit to said leasers of $16.67 per ton; that there was about 1000 tons in the foot wall lead left up to the 500 foot level, which could have been mined by the said leasers in 90 days, at a net profit to said leasers of $12.50 per ton.

At about this time, being about January 16th, 1922, three of said co-partners were prevented and kept from going into said mine to continue with their said sub-lease by the said corporation, and the said corporation thus violated the terms of the said lease without cause to the damage of said leasers in the sum of $22,166.67.

The second cause of action contains most of the allegations of the first cause of action, and in addition thereto, it is alleged as follows:

> That on or about the 19th day of October, 1921, while the said plaintiffs were working in and upon the said lease, the said plaintiffs entered into contract with the defendant, at the said defendant's special instance and request, to purchase 5,000 shares of stock in the defendant corporation from the said defendant at the agreed price of 25c per share net, and that the said stock was to be paid for by said plaintiffs as follows, to-wit: $25.00 was to be taken from the net returns of each of said plaintiffs share on each and every railroad car, of about 50 tons each shipped by the said plaintiffs from said lease and sold to the smelter on and after said date.
>
> That thereafter the said plaintiffs shipped a railroad car of about 50 tons on the 27th day of October, 1921, and $25.00 from each of said lessees was

deducted from their share in the returns of each railroad car of ore so shipped, and the said money deducted was credited upon the said 5,000 shares of stock, and that $25.00 from each of said plaintiffs was deducted from each and every railroad car thereafter shipped by said plaintiffs and sold to the smelter.

That on or about the 3rd day of January, 1922, the said plaintiffs had paid for 2,500 shares of stock by the deductions made on each railroad car so shipped as aforesaid, and that the said defendant delivered 500 shares of stock to each of the said plaintiffs or 2,500 shares of stock, and thereby ratified said agreeement to sell stock to said plaintiffs as aforesaid.

That thereafter on or about the 31st day of January, 1922, the sixth railroad car of ore of about 50 tons, after entering into said contract to purchaser stock was loaded by the said plaintiffs and shipped to the smelter and sold, and that $25.00 was deducted from the net returns of each of said plaintiffs to pay on said contract for said stock.

That thereafter on or about the 3d day of March, 1922, the said plaintiffs shipped the seventh railroad carload of ore, after entering into said contract to purchase stock, from said lease of about 25 tons to the smelter and sold the said ore, and that the sum of $25.00 was taken from the net returns of each of said plaintiffs on said railroad car to pay on said contract for said stock.

That the plaintiffs, Lawrence Monzetti, Pete Gaido, Batt Tamietti and John Pagleero worked

continuously under the said sub-lease and the said extension thereto from the 26th day of June, 1921, until the 16th day of January, 1922, and that plaintiff, Frank Tamietti worked continuously under the said sub-lease and the said extensions thereto from on or about the 20th day of July, 1921, until the 16th day of January, 1922; that the defendant then and there on or about the 16th day of January, 1922, arbitrarily ejected plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti without cause, from said property, and arbitrarily refused to permit the said plaintiffs to go on with the said sublease, without cause, and arbitrarly refused to permit the said plaintiffs, Lawrence Monzetti, Pete Gaido and Batt Tamietti, to enter into said mine or upon said property for the purpose of breaking ore and hoisting ore to finish their contract of paying for the stock the plaintiffs had purchased, without cause, or to enter in or upon the said property, and arbitrarily cancelled and rescinded the said sublease, without cause, and that defendant arbitrarily refused to deliver 400 shares of stock heretofore paid defendant by plaintiffs by deductions of $25.00 from each of said plaintiffs share from each of the said last 2 railroad cars of ore shipped, without cause; and that defendant ever since the said last 2 railroad cars of ore have been shipped as aforesaid, have arbitrarily refused to deliver the said 400 shares of stock to plaintiffs heretofore paid for by plaintiffs as a foresaid, without cause.

That there were about 1,000 tons of ore averaging 70 ounces of silver per ton and $11.00 per ton in gold or of the value of $81.00 per ton in the vein of ore on the hanging-wall side of said lead, between the bottom of said winze and the 500-foot level of said mine, and the east and west line of said mine yet to be mined on said date that could and would have been mined by said plaintiffs within 30 days from and after the said 16th day of January, 1922, if, the said defendant had not interfered with the said plaintiffs and arbitrarily cancelled and rescinded the said sub-lease, without cause, that the said plaintiffs were and are entitled to under said sub-lease, to mine and ship to the smelter under the terms, conditions and royalties of the aforesaid sub-lease, and that these plaintiffs would have realized on said ore a net profit to themselves of Sixteen and 67|100 ($16.67) Dollars per ton; and that there were approximately One Thousand (1,000) tons of ore to be mined in the footwall of said lead between the bottom of said winze and the 500-foot level of said mine and the east and west lines of said mine which could and would have been mined by said plaintiffs within a period of ninety days from and after the 16th day of January, 1922, if the said defendant had not interfered with said plaintiffs and arbitrarily cancelled and rescinded the said sub-lease, without cause, as aforesaid; that said plaintiffs were and are entitled under said sub-lease to mine and ship to the

smelter under the terms, conditions and royalties of the aforesaid sublease, which would have averaged about 37 ounces of silver per ton and about $7.00 in gold per ton, or of the value of $42.00 per ton for said ore, which said leasees could have mined at a net profit of Twelve and 50|100 ($12.50) Dollars per ton to said plaintiffs under the terms and conditions of said sub-lease, and said defendant arbitrarily refused to permit plaintiffs to go on with the aforesaid contract to purchase said stock as aforesaid, without cause.

That the market value of said stock is now seventy cents per share; that since the cancellation and rescission of said lease and refusal of said defendant to permit plaintiffs to mine and ship the said ore necessary to finish buying said stock the said stock has reached the market value of $2.00 per share, and that plaintiffs would have realized a net profit to themsleves, if they had been permitted to mine and ship enough ore to pay for the balance of said stock, in the sum of $1.75 per share.

That by reason of the cancellation and rescission of the said lease, as aforesaid, the plaintiffs have been unable to ship the balance of the ore necessary to finish the said contract of purchasing the said stock, to-wit: 1,300 shares of stock, which they would have realized a net profit of $1.75 per share or $2,275.00.

That by reason of the arbitrary cancellation and recission of said lease by said defendant, without

cause, and the arbitrary ejectment of said plaintiffs from said property by the defendant, and the arbitrary refusal of the defendant to permit the plaintiffs to go on with said lease, and go on and complete said contract to purchase said stock or to enter in or upon the said property, without cause, and the arbitrary refusal of the said defendant to deliver the said 400 shares of stock to plaintiffs, that plaintiffs, have herefore paid for; that the plaintiffs have been damaged in the further sum of $3,075.00 upon this their second cause of action no part of which has been paid. (Tr. 21-26).

The defendant admitted its corporate capacity, that it was operating the Goldsmith Mine, and that Matt W. Alderson was its manager and Superintendent; defendant denied practically every other allegation in the two causes of action; it also plead the following Statutes of Fraud, to-wit:

> "That said pretended contract was and is void under and by virtue of provisions of paragraphs 1 to 5 of section 7519, Section 7593 and Section 7939 of the Revised Codes of Montana 1921."

These allegations are denied by a reply of the plaintiffs.

The plaintiffs introduced evidence in support of the various allegations which are denied by the answers of the defendant.

We shall review and quote some of the evidence which we think is pertinent to the questions involved under the assignments of errors in the Cross-Writ of Error. On the

question of admitting certain exhibits in evidence over the objections of said plaintiffs, assignment of error No. 1 contains the facts which we are concerned with in said assignment of error No. 1, and the facts therein contained read in connection with each of the next five assignments of error will be sufficient facts for the consideration of each.

On the question of the court committing error in sustaining the motion for an instructed verdict as to the second cause of action, we have the following evidence, to-wit:

Batt Tamietti testified as follows:-

> While we were working taking out this ore we had another transaction with the defendant, and that was Mr. Alderson, the manager of the Crystal Copper Company, came with a fellow by the name of Frohock, from Boston, and they came down one morning, in the winze to where we were working, and said they would be glad if we would buy some stock of the Crystal Copper Company. I said I was sure going to buy some, but I couldn't buy any stock for the other fellows, but I was going tonight to Mr. Frank Tamietti's house and we would speak there together and would decide how many shares we were going to buy. So that same evening we went to Frank Tamietti's house all together, myself and Mr. Pete Gaido, and Mr. Lawrence Monzetti and Mr. Frank Tamietti was there too in his house, and Mr. John Pagleero, and Mr. Frohock, and I understood he was from the Crystal Copper

Company, and Mr. Alderson, the manager of the Crystal Copper Company, and so we five partners got together and we decided to buy five thousand shares but never had the money to pay right away, so we spoke together and agreed on the next shipment to pay so much, and decided to pay twenty-five dollars for every shipment we made from the ore, if they were satisfied, and then we spoke to Mr. Alderson and Mr. Alderson spoke with Mr. Frohock, and Mr. Frohock said that was satisfactory enough to the company, and he said, "You fellows have a nice showing there and I wish you would make a million dollars." And he said that was satisfactory to the company, just to pay each twenty-five dollars until this one thousand shares was paid for; twenty-five dollars from each shipment, and, *the first car we shiped Mr. Alderson gave the money to the Crystal Copper Company, and the statement showed that we paid twenty-five dollars each for those shares. We shipped seven cars after entering into this agreement, and there was twenty-five dollars taken out of each car to pay for our stock. I only received five hundred shares, but paid for seven hundred and haven't got the other two hundred shares yet. The stock was made out to me and each of my partners, and was signed by the Crystal Copper Company, and then below that signed by Mr. Matt Alderson, the general manager of the Crystal Copper Company.* In this lead that we struck in the footwall, from the appearance of the ground

I would say that lead ran about the same length as the other in the hanging, and would go from ten to fifteen feet west. Of course the back caught the south lead and caught the north lead in the same way. By the north lead I am referring to the lead in the footwall. This north lead showed up on the 500-foot level. The average width of it was two and a half to three feet. After we drove this cross-cut north into the footwall and discovered this lead, and after we had timbered right close to the breast, we extracted the ore on both sids of this cross-cut and we were intending to work the south lead, but the day after Mr. Alderson, the manager of the Crystal Copper Company came down to my house and told me he say, "I am sorry, Batt, but I have to cancel your lease." So I was suprised, I never said a word, but was suprised, because that was the first time after I was leasing there a long time that we struck ore, and he chased me out. After a little arguing he asked me to show him where Mr. Lawrence Monzetti lived; so I showed him Mr. Monzetti's place, and he told him the same thing. Mr. Lawrence Monzetti asked him if it was for all of us and he said "yes," but then he told us, he said, "I see your car ain't complete yet; you got some ore there in the ore bin, and I don't think you have got fifty ton in there yet, and go up to-night and complete your car, and then your lease is cancelled." We went up at ten o'clock, we used to go out at ten o'clock at night to work, and so we went up

there, me and Pete Gaido and Lawrence Monzetti, and tried to go to work, but Mr. Jim Delong, the engineer of the Crystal Copper Company, came over to me and said, "I am sorry, Batt, but I have got orders from Mr. Alderson to not lower you fellows down." I said, "I am not mad at you; I know you have nothing to do with this; you got your orders. (Tr. 88, 89-80).

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After purchasing this stock in the Crystal Copper Company I kept myself informed as to the market value of the Crystal Copper Company stock. Between the time I purchased the stock and the present time the highest market value of that stock was two dollars and five cents, or something like two dollars. I estimate that I have been damaged in the difference between twenty-five cents and two dollars on three hundred shares of stock, and for two hundred shares of this stock which was never delivered to me. All the stock that has been paid for by the co-partnership has been received by the different co-partners except four hundred shares. (*Tr.* 98).

Pete Gaido testified in part as follows:-

In the month of October we had a stock transaction with Mr. Alderson, manager of the Crystal Copper Company. One day we were working down in the mine and Batt Taimetti and my other partners were there, and Mr. Alderson the general manager of the Crystal Copper Company and a direc-

tor from Boston, if I am not mistaken, Mr. Frohock, came down in the place and Mr. Alderson said, "This man wants to see this place look nice," and it was in good shape, and he said. "Boys, it is in fine shape," and he said, "This is the one place I like to come down to see the ore and pay rock," boys, do everything fine and I hope you make a million dollars, and the company makes something," and he said, "Boys, if you are willing to buy some stock from the company, it would be nice and better for us, and the stock is going up soon." And Batt Tamietti, he told us, we can see about that; of course we cannot buy any stock until we see the other partners some place and we can talk over about it. And so then we met down at Frank Tamietti's house and we had a talk about buying stock there. We agreed to buy five thousand shares, one thousand each for the five partners. We had no money to buy at the present time, and we thought if the company give us a chance to pay at twenty-five dollars every car we shipped. We shipped after that seven cars, and there was twenty-five dollars on each car deducted from the shipment that we made, and we got a certificate for 500 shares. The certificate was in my name and the name of the Crystal Copper Company. I received 500 shares. I paid for 300 more but didn't receive that stock. Received five hundred shares from five cars shipments. The other two cars that were shipped I didn't receive any shares of stock for, but there were deductions made from my checks on

each car. I have not received the shares of stock.

On the 16th of January, 1922, I did not see Mr. Alderson but Batt Tamietti and Lawrence Monetti met down at Batt Tamietti's house and he told me Mr. Alderson was down and told Lawrence Monetti the lease was cancelled on the 16th day of January, 1922. On that day he went up to the Goldsmith mine to go to work, three of us, Batt Tamietti, Lawrence Monzetti and myself, and Tamietti met the engineer from the Goldsmith mine and he told Batt, "I am sorry, but I can't lower you down any more, you fellows." he said, "that is the orders from the Crystal Copper Company and Mr. Alderson." We tried to go down to work that night but it was no use. I told the engineer it was all right "if you got the order." I was willing and ready to keep on with the lease, to keep on with the work, and have been ever since.

At the present time four of us men worked in the winze and drift below the 500-foot level, and after we got through sinking the winze there were five, Frank Tamietti, came to work then, but he was sick at first. After we sank the winze and got through with it us five partners were working together and nobody else, but after that there was a boy working for us, John Arderson was working there for us five partners, and we paid him five dollars and twenty cents a day.

In my opinion it would take about thirty days to have stoped out the ore left in the hanging-wall

lead at the time were ejected from the lease on January 16, 1922, with the six of us working there. In the footwall lead it might give us more trouble, but in my opinion it would take about forty days to have stoped out the ore there, or forty-five days, six men working. There was nobody else working down in the drift and in the cross-cut and in the winze besides us five partners and Mr. Ardenson when we were working there. We were th only ones working there, the only ones taking out ore. (Tr. 124-127).

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In my opinion as a practical miner I would say the ore we discovered along the drift extended up to the 500-foot level. The walls of the vein were parallel. The trend of the vein throughout along the line was parellel. As a practical miner in my opinion I would say that the values of the ore we found along the drift that we shipped to the smelter would continue up in the way I referred, up to the 500-foot level; the ore was right up to the 500-foot level; of course we cannot go in the ground, but it was up to the 500-foot level, and in my opinion the value would be about the same, some little higher and some a little lower, but it is pretty hard to tell that. It was pay rock all the way up. (Tr. 124).

Frank Tamietti testified in part as follows:-

I was working in partnership with Batt Tamietti, Lawrence Monzetti, Pete Gaido and John Pagleero on the 15th of January, 1922, but not the 16th.

I worked in the Goldsmith mine on and after January 15th, and in a winze something like about one thousand feet in a northwesterly direction from the No. 1 shaft on the 500-foot level, and took out some ore there from that winze and shipped it to the smelter. Having examined Plaintiff's Exhibit "Q" I will state I am the same party who is named on the back thereof as Frank Tamietti, in the return. That is the ore that was left there. After they left there was three cars and not any more. We shipped those three cars that was left on this old stope that we had the lease between.

Mr. McCRACKEN.—We will offer exhibit "Q" in evidence. It shows the value was taken from the place after the lease was taken on the part of plaintiff.

Mr. WAGNER.—We object as incompetent, irrelevent and immaterial for any purpose. May it please the Court, the testimony so far discloses that they were operating under a license and got a lease, and therefore plaintiffs are not entitled to (153) recover for any ores thereafter shipped from the mine or any place in the mine.

Examination by the COURT.

The WITNESS.—This is supposed to be the ore taken out the return of shipments from this very same property worked by the plaintiffs, the very same ground that I worked, and I know that because I stayed there until I saw the last car of ore, John Pagleero and I.

The COURT.—The objection is overruled.

Mr. WAGNER.—Exception.

(Document received in evidence, marked Plaintiff's Exhibit "Q" and is as follows:) (Tr. 156-158)

Exhibit "Q" shows that the "Leasers-one-half" of the said three railroad cars shipments of ore as follows: $1,006.74; $1,986.05; and $988.00, or a total of $3,970.-79, showing that there were more ore in the territory leased by the plaintiffs than was required to pay for the balance of the stock contracted for.

The testimony of Matt W. Alderson given at a former trial, introduced at the trial of the instant case, is in part as follows:

Q. State your name, please.

A. Matt W. Alderson

Q. Where were you employed during the year 1921?

A. At the Goldsmith mine in Walkerville.

Q. And what Company owned the Goldsmith mine or was working the Goldsmith mine at that time? A. Crystal Copper Company.

Q. And what position did you hold with the Crystal Copper Company?

A. I was General Manager.

Q. General manager and superintendent?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit "A" and ask you to state whose writing that is on the back of those smelter returns, if you know?

A. They are all in my writing.

Q. The money was divided up as it purports to be, between the different leasers on this lease?

A. Yes, sir. (Tr. 135-136).

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Q. Have you the two hundred shares of Crystal Copper Company's stock in your possession that belongs to one of the plaintiffs, Batt Tamietti?

Mr. FRANK WALKER.—To which we object as incompetent, irrelevant and immaterial; no bearing on the issues in this case at all.

Mr. McCRACKEN.—That is one of the parts of the damages, they are withholding the stock.

The COURT.—Overruled.

Exception.

A. I don't know as I fully understand the question or the purport of it.

The COURT.—Read the question.

Q. (Question read.)

A. No, sir, I have not.

Q. Do you know where those two hundred shares are? A. I sold them. (133)

Q. You sold them? A. Yes, sir.

Q. You never delivered them?

A. I offered to deliver them and they wouldn't accept them. I offered them to the lawyers, the attorneys.

Q. There was a string tied to that offer, was there not? A. No, sir.

Q. We had to dismiss the suit then pending?

A. Certainly.

Q. And at the time you made the offer, state who those lawyers were you made the offer to.

A. To the gentlemen here, the plaintiffs' attorneys.

Q. Mr Tyvand and myself? A. Yes, sir.

Q. And at that time you had two hundred shares of stock belonging to the plaintiff Pete Gaido, did you not?

A. I had two hundred shares belonging to Pete Gaido and two to Batt Tamietti, yes ,sir.

Q. And you told us you would not deliver them unless we dismissed a certain suit then pending?

A. Of course not.

Q. And you made full settlement on nine cars of ore shipped by these plaintiffs and their co-partners, you paid them all the interest they had coming on the cars?

A. No, sir, there is $11.43 due Batt Tamietti and $11.42 due Pete Gaido. (Tr. 137-139).

O. Are you familiar with the market value of Crystal Copper Company stock? A. Yes,sir.

Q. Since October, 1921? A. Yes, sir.

Q. What was the highest market value of this stock since October, 1921 to the present time?

A. It approached two dollars.

Q. That is per share? A. Yes, sir.

Q. You were general manager all the time between June, 1921 to February, 1922, were you not, Mr. Alderson?

A. Why practically most of that time; they changed my title two or three times, but in fact I was in absolute charge.

O. General Manager? A. Yes, sir. (*Tr.* 139-40)

ASSIGNMENT OF ERRORS UNDER CROSS WRIT OF ERROR.

1

The Court erred in overruling plaintiffs' objections to the testimony given by the witness Lawrence Monzetti and the offer in evidence of Defendant's Exhibits "J." "K," "L," "M," and "N," as follows:

"This is my signature on Defendant's Exhibit 'J.' That is my name on the front, this is my name on the front of Defendant's Exhibit 'L'. That is my name on the back; this is my name on Defendant's Exhibit 'K'; that is my signature on Defendant's Exhibit 'M,' and that is my name on the front.

"Mr. WALKER.—If the Court please, we now offer in evidence Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N.'

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'J,' upon the grounds and for the reasons that the same is irrevelant and immaterial and not within the issues of this case, furthemore the same does not prove or tend to prove any of the issues of this case.

"The COURT.—The objections is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'K,' upon the grounds and for the rea-

sons that the same is irrevelant and immaterial and not within the issues of this case, furthemore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release as to the 300 shares of stock claimed by Monzetti, as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"Mr. McCRACKEN.—Let the record show that plaintiffs make the same objection to exhibit 'L' as plaintiffs made to exhibits 'J' and 'K'.

"The COURT.—Let the record so show and that the objection is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs make the same objection to exhibit 'M' as made to exhibits 'J,' 'K,' and 'L.'

"The COURT.—Let the record show same objection and that the objection is overruled.

"Exception.

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'N,' upon the grounds and for the reasons that the same is irrelevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release by Monzetti as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"(Documents received in evidence, marked Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N,' and are as follows:)

"DEFENDANT'S EXHIBIT 'J.'

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti $100.00—One hundred and no|100—Dollars.

MATT W. ALDERSON.

To W. A. Clark Brothers,
93-1 Bankers 93-1,
Butte, Montana.

(Endorsed across face:)

W. A. Clark & Brothers, Bankers.
Paid
Mar. 6, 1922.
Butte, Montana.

(Endorsement on the back of above exhibit:)

Lawrence Mansanti. Paid.

"DEFENDANT'S EXHIBIT 'K.'

Butte, Mont., Mar 4, 1922.

Received of Matt W. Alderson One Hundred Dollars in full for my 200 shares of stock in the Crystal Copper Co. and for any real or implied right which I may have for the purchase of 300 shares additional.

LAWRENCE MOZETTI.

Witness:

"DEFENDANT'S EXHIBIT 'L.'

Crystal Copper Co.

Butte, Montana, March 4, 1922.

Pay to the order of Lawrence Monsanti—$11.43—Eleven & 43|100 Dollars.

CRYSTAL COPPER CO.

(9) By Matt W. Alderson.

to the First National Bank of Butte, Montana.

93-2.

(Endorsements on the back of above exhibit:)

This check is issued in payment for services of for bill rendered to Mar. 4, 1922, for his part of Car 58763. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid: 3-6-22.

"DEFENDANT'S EXHIBIT 'M.'

Crystal Copper Co.

Butte, Montana, Feb. 1, 1922.

Pay to the order of Lawrence Mansanti—$80.85—Eighty & 85|100 Dollars.

CRYSTAL COPPER CO.

(9) By Matt W. Alderson.

To The First National Bank, Butte, Montana 93-2.

(Endorsement on back of above exhibit:)

This check is issued in payment for services or for bill rendered to Jan. 31, 1922, or for his part lot 5-E, B. If incorrect do not endorse but return to have matter made right. Endorsement and cashing means its acceptance in full.

LAWRENCE MANSANTI.

Paid 2-1-22.

"DEFENDANT'S EXHIBIT 'N.'

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of Eleven & 43|100 Dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a co-partner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOSETTI.

Witness:

MATT ALDERSON.

2

The Court erred in denying plaintiffs' motion to strike from the evidence certain evidence, to-wit:

"Mr. McCRACKEN.—If the Court please, plaintiffs move the Court to strike from the evidence defendant's Exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore, the signature was obtained at a time Monzetti was incompetent to act and did not know what he was doing, furthermore, he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer.

"The COURT.—The motion will be denied.

"Exception."

3

The Court erred in denying plaintiffs' motion to strike from the evidence certain evidence, to-wit:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'K,' as was made to exhibit 'J.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'K,' and that the motion is denied.

"Exception."

4

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit 'L,' which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'L,' as was made to exhibits 'J' and 'K.'

"The Court.—Let the record show the same motion as to Defendant's Exhibit 'L,' and that the motion is denied.

"Exception.' '

5

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit "M," which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'M,' as was made to exhibits 'J,' 'K,' 'L.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'M,' and that the motion is

denied.

"Exception."

6

The Court erred in denying plaintiffs' motion to strike from the evidence Defendant's Exhibit "N," which motion is as follows:

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'N,' as was made to exhibits 'J,' 'K,' 'L,' 'M.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'N,' and that the motion is denied.

"Exception."

XX 7 XX

The Court erred in granting defendant's motion for a direct verdict at the close of all the evidence in the case as to the second cause of action contained in the amended complaint in this action; which motion is in words and figures, as follows:

The Defendant now moves the Court to direct a verdict in favor of the defendant and against the plaintiffs on the grounds and reasons following:

First: There is a fatal variance between the allegation and the proof in this, that plaintiffs rely for a recovery upon the proposition as alleged in their complaint that the plaintiffs were and are a mining co-partnership, engaged in mine sub-leasing and sub-letting from the defendant Crystal Copper Company, whereas the proof affirmatively shows and discloses that the relationship of mining partners does not and never did exist between these parties

in so far as their negotiations and work for the defendant was concerned, that the proof affirmatively discloses that they were operating and working under a license and not a lease, and that their relationship was nothing more than that of working agreement for a share of the profits.

There is a fatal variance because the parties Lawrence Monzetti and Batt—the plaintiffs Pete Gaido and Batt Tamietti, if they have any cause of action at all against the defendant it would be as individuals for work, labor and services performed.

Next: That the evidence is insufficient in law to prove a mining co-partnership between the plaintiffs in their relation with the defendant in this case. The evidence is insufficient to prove a lease between the plaintiffs and the defendant, and the evidence establishes if it establishes any contractual relationship at all, a contract embodying a license. The evidence is insufficient to establish a lease for the reason that a lease of (a) the real property of a mining corporation may only be secured by compliance with the provisions of section 6004 of the Revised Codes of Montana, 1921, which requires affirmative approval of the stockholders and the board of directors.

Next: The evidence is insufficient to warrant a recovery by the plaintiffs or any of them, upon the theory that they are a mining co-partnership because under the express provisions of section 8059 of the Revised Codes of Montana of 1921, the acts and deeds and things of a majority of the members of such partnership controls all acts of the parntership, and it affirmatively appears in this case that a majority of the members of the so-called partnership

have no interest in this litigation, and the same may not be maintained by a minority of the members.

Next: The evidence is wholly insufficient to prove any damages sustained by the plaintiffs or any of them in the event the Court should hold that they were operating under a lease and not a license for the reason that the evidence pertaining to proof of prospective profits or damages by reason of the cancellation of the lease falls short of giving to the jury any tangible basis upon which to base any rational judgment as to damages, but that it would require speculation and conjecture to reach any verdict, and the same would be the result of mere guess-work having no foundation in the evidence in this case, particularly for the reason that there is no evidence showing or tending to show how long it would have required the plaintiffs to mine the ore in place which they contend they were deprived of mining, nor the cost of mining such ore nor the incidental expenses, or work or labor necessary to prepare the ore for shipment nor is there any evidence in this case showing that the ore if mined could have been smelted for, nor what proportion of the net profits of such ore proportionate of the net profits in dollars would accrue to plaintiffs. There is no evidence before the Court showing what the market price of the metals contained in the ore and from which the plaintiffs would derive net proceeds was or would be.

Further, the contract contended for by the plaintiffs as alleged in their complaint is one void under the statute of fraud of the State of Montana, and the proof in this case discloses that the contract contended for in the com-

plaint is not a lease but a working contract or license.

These matters being directed to the first count.

Upon the second count we urge all of these matters and in addition that plaintiffs may not recover under the second count under any theory of the case for the reason that it affirmatively appears from the evidence in this case that any stock transactions or transactions for the capital stock of the Crystal Copper Company were had with Matt W. Alderson as an individual; and not as a representative of the defendant company, and for the further reason that there is no evidence in this case to prove any damages which plaintiffs sustained or might have sustained by reason of non-delivery on any stock to them to be earned in the future. That the measure of damages for breach of agreement to sell personal property not paid for, is fixed by statute, particularly sections 8674 and 8700 of the Revised Codes of Montana of 1921. There is no evidence to show the measure of damages as fixed by these sections of the code, in that the evidence fails to disclose that the value of the property of the stock in question was the market price thereof and the price at which it might have been bought or its equivalent bought in the market nearest the place where the stock should have been delivered or would have been delivered and put into the possession of the plaintiffs if entitled thereto at all at such time after the breach of duty upon which plaintiffs rights or the rights of any of the plaintiffs to damages accrued or within such time as would suffice with reasonable diligence for them to have been purchased the stock at the nearest or in the open market.

As directed to all of the evidence and to both counts of the complaint, the evidence wholly fails to show any measure of damages in that it fails to disclose the cost of removing the ore the plaintiffs claim they were deprived of mining or the number of men it would have been necessary to employ to remove it or how many of the partners or alleged partners, or the labor of how many of the partners or alleged partners would be required to remove it or the cost of them mining, would have been.

And for the further reason that the evidence wholly fails to disclose that the partnership as a mining partnership or otherwise, collectively or individually was ready, willing and able to perform its part of the contract alleged or would have performed it as a mining partnership or as individuals had they not been interrupted by the acts of the agent of the company.

The COURT.—The motion of the defendant is granted as to the second count in the complaint, and the jury will be instructed to find for the defendant on the second count.

Mr. WALKER.—Note an exception to the ruling of the Court.

Mr. TYVAND.—We ask for an exception.

8

The Court erred in receiving the verdict which is, excepting the title of the court and cause, as follows:

"VERDICT."

We, the jury in the above-entitled court and action find our verdict in favor of the plaintiffs, Batt Tamietti and Pete Gaido, and against the defendant and assess

plaintiffs' damages in the sum of Seven Hundred Seventy & 66|100 ($770.66) Dollars, each.

(Signed) M. V. CONROY,
Foreman."

And in entering judgment in accordance therewith.

ARGUMENT.

ASSIGNMENT OF ERRORS NUMBERED I. II, III, IV, V and VI.

Under the Assignment of Error numbered 1 there are several legal points we desire to present and discuss. There are five exhibits admitted in evidence, over the objections of the plaintiffs, under one offer in evidence of the said five exhibits, to-wit: "J," "K," "L," "M," and "N," (Tr. 130) and (Tr. 44-45)

There are five seperate motions to strike said exhibits from the evidence in this case. (Tr. 45-46) These five motions are set out in assignments of errors numbered from 2 to 6, both inclusive. Since the assignment of error numbered 1 involves about the same legal points as the next five assignments of errors, we shall therefore discuss the first six assignments of errors under one head.

Exhibit "J" is a check by Matt W. Alderson in favor of Lawrence Monzetti. According to the testimony in this case, it was given in payment by Mr. Alderson to Mr. Monzetti for 200 shares of corporation stock, Mr. Monzetti held in the Crystal Copper Company, and it is not within the issues and has no bearing on any issues in this case. (Tr. 177))

Exhibit "K" is a purported receipt and release from Lawrence Monzetti to Matt W. Alderson for said 200

shares of corporation stock, which Mr. Alderson had purchased from Mr. Monzetti mentioned above in connection with exhibit "J", and is a purported release for the right to purchase 300 shares additional. It is not within the issues and has no bearing on any of the issues in the instant case. (Tr. 177).

Exhibit "L" is a check for $11.43 in favor of Lawrence Monzetti by the Crystal Copper Company as his cash payment of his share of the 10th, or last, carload of ore shipped, after a deduction by said company had first been made of $25.00 for 100 shares of its stock which plaintiffs had purchased from said company, and there is no issue in this case on that and should not have been admitted in evidence. (Tr. 177).

Exhibit "M" is another check by the Crystal Copper Company of $80.85 to Lawrence Monzetti for his share of the cash payment on the 9th carload of ore shipped, after the said company had deducted $25.00 for 100 shares of its stock which plaintiffs had purchased from the Crystal Copper Company. This has no bearing on the issues in the instant case. (Tr. 177).

Exhibit "N" and the plaintiffs' objections to its introduction in evidence are as follows:

"DEFENDANT'S EXHIBIT 'N.'

Butte, Montana, March 4th, 1922.

Received of the Crystal Copper Company, a corporation, of Butte, Montana, the sum of Eleven & 43|100 Dollars, being my proportionate share in all ores shipped in the name of the Crystal Copper Company, a corporation, by me, as a co-par-

tner with others with whom I was interested in a certain lease.

This payment is acknowledged by me as full and complete settlement and satisfaction of any and all claim or claims that I may have against the said Crystal Copper Company, and as full and complete satisfaction of any and all demands that I may have against the Crystal Copper Company, the corporation aforesaid.

LAWRENCE MOSETTI.

Witness:

MATT ALDERSON.

Filed Dec. 15, 1924. C. R. Garlow, Clerk."

"Mr. McCRACKEN.—Plaintiffs object to the introduction of exhibit 'N,' upon the grounds and for the reasons that the same is irrevlevant and immaterial and not within the issues of this case, furthermore the same does not prove or tend to prove any of the issues of this case, also it fails to show any consideration for any pretended release by Monzetti as he received nothing more than that which he had coming at that time.

"The COURT.—The objection is overruled.

"Exception.

"(Documents received in evidence, marked Defendant's Exhibits 'J,' 'K,' 'L,' 'M,' and 'N,' and are as follows:)

After said exhibit "N" was admitted in evidence and Mr. Monzetti had been cross-examined by the plaintiffs' attorneys, the following motion to strike it from the ev-

idence was made, and the following ruling was made, to-wit:-

"Mr. McCRACKEN.—If the Court please, plaintiffs move the Court to strike from the evidence Defendant's Exhibit 'J,' upon the grounds and for the reasons that the same is irrelevant, that no consideration has been shown for the same, as Monzetti received nothing more than that which he had coming at that time, furthermore, the signature was obtained at a time Monzetti was incompetent to act and did not know what he was dong, furthermore, he was unable to read or write, also it does not prove or tend to prove any of the issues in this case as no release was plead in the answer.

"The COURT.—The motion will be denied.

"Exception."

"Mr. McCRACKEN.—Plaintiffs make the same motion as to Defendant's Exhibit 'N,' as was made to exhibits 'J,' 'K,' 'L,' 'M.'

"The COURT.—Let the record show the same motion as to Defendant's Exhibit 'N,' and that the motion is denied.

"Exception."

RELEASE NOT PLEAD

This purported release, exhibit "N," was not plead in the defendant's answer, and therefore was entitely outside of the issues in this case. It therefore should not have been admited in evidence. Among some of the authorities on this question are the following:-

"A release by the plaintiff must be specially plead-

ed." Sutherland Code Pleading Pratice and Forms, Vol. 1, Sec. 532.

"A release, to be available as a defense to an action for debt should be affirmatively set forth in the answer." Collier vs. Field, 2 Mont. 320, 324.

"New matter must be specially pleaded; and whatever admits that cause of action, as stated in the complaint, once existed, but at the same time avoids it —that is, shows that it has ceased—is new matter. It is that matter, which the defendant must affirmatively establish. Such are release, and accord and satisfaction, Defense of this Character must be distinctly set up in the answer, or evidence to establish them will be inadmissable. This view disposes of the appeal and necessitates a reversal of the judgment." Coles vs. Soulsby, 21 Calif. 47, 50.

"As a general rule a release of a cause of action is not available as a defense unless specially pleaded." 34 Cyc. 1094.

8 Pac. Digest. Release Secs. 44 and 45.

42 Cent. Digest. Release Secs. 86—89.

Grimwald vs. Freezs, (Calif.) 34 Pac. 73.

NO CONSIDERATION FOR RELEASE.

Further, the testimony shows that the purported release was given without any consideration being paid therefor. Mr. Monzetti testified in part as follows:-

"He, Mr. Alderson, did not pay me any money other than that what I already had coming for ores shipped before I signed the instrument; just paid what I already had coming. He did not give me

any stock other than what I already had paid for before I signed the instrument. Exhibit "N" was signed at the same time exhibit "K" was signed; both signed the same time. In signing exhibit "K" the defendant nor Mr. Alderson gave me anything other than what I had coming at the time I signed them, that is what I had coming for ore already shipped, and stock I had already paid for. He did not make any explaniation to me that it would be a release to the company on the suit then pending; he said nothing about a suit then pending. (Tr. 176-177).

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I don't read or write the English language very much. I cannot read exhibit "K"; couldn't read it; couldn't read Defendant's Exhibit "N." (Tr. 177).

In support of our contention that a release without a consideration is void and of no effect, we submit the following authorities:-

"A release of a legal obligation for which the consideration is the performance by the releasee of some other undisputed duty owing by him to the releasor or to a third person is invalid for want of consideration. So the full performance of one obligation is not consideration for the discharge of that obligation and the release of a second obligation."

(numerous cases cited in the foot note).

34 Cyc., page 1051, Sec. 3.

The payment of Eleven & 43|100 Dollars by the defendant to Lawrence Monzetti, was his proportionate

share of the ore shipped in the last, or 10th carload of ore, after $25.00 had been deducted for 100 shares of stock in said corporation, and it was the "undisputed duty by" the defendant to the said plaintiff to pay him the said amount as his share in the returns from the said carload, and therefore could not be a valid consideration for a release of other claims. (Tr. 177) The authorities are agreed on this question, and the following are some of them, to-wit:-

Fire Ins. Ass. vs. Wickman, 141 U. S. 564-582; 35 L. Ed. 860; 12 Supt. Ct. 84.

C. M. & St. P. Ry. Co., vs. Clark, 178 U. S. 353-373; 44 L. Ed. 1099; 20 Supt. Ct. 924.

Roses Notes Vol. 15, page 860.

Roses Notes Vol. 18, page 585.

Whitaker etc. vs. Standard etc., 51 L. R. A. (N. S.) 315 (note).

20 L. R. A. 785-786 (note).

11 L. R. A. 711 (note)

We submit that admitting the said exhibit "N" in evidence in this case is reversable error, both, because there was no consideration for it and therefore was invalid, and next because the purported release, exhibit "N", was not plead which the law requires of the defendant, when it relies on a release for a defense. If it had been plead, then the plaintiffs could have properly plead their defense of fraud, no consideration and such other defense as they may have had and been propertly prepared to have met the defendant at the trial on the issues in the case. This contention applies to both causes of action set out in the

amended complaint in this case.

ASSIGNMENT OF ERROR NUMBERED VII

Assignment of error numbered VII is, that the court erred in granting the defendant's motion for an instructed verdict in its favor as to the second cause of action. (Tr. 181-185) The allegations of the second cause of action, as set forth, shows a contract to purchase, by the plaintiffs, of 5000 shares of stock in the defendant corporation. The uncontradicted evidence shows, that 3700 shares of stock have been paid for and have been delivered by the said defendant to the said plaintiffs, and that 400 shares of stock have been paid for by the plaintiffs and the defendant has refused to deliver them after demand by the plaintiffs, and the defendant has sold them to somebody else; (Tr. 137-138) that 900 shares have not been paid for, nor have they been delivered by the defendant to the plaintiffs, because of the defendant having refused and is refusing and keeping the plaintiffs from going into the Goldsmith Mine to mine the ore under their sub-lease with the defendant; that the plaintiffs have been ready and willing to extract ore under the said sub-lease, and thus pay for their 900 shares of stock in said corporation, but the defendant, by its said action, has refused to permit plaintiffs to thus pay for their said 900 shares of stock; that the defendant has permitted and assisted other persons than said co-partnership, to mine the ore from the territory sub-leased to the said co-partnership, and such other persons have mined the ore out of said territory amounting to $3,970.69, which belonged to the said co-partnership, (Tr. 156-158 exhibit "Q") and $225.00 is the

amount which would have paid for the 900 shares, in full.

The foregoing evidence shows that the defendant converted both the 400 shares already paid for and the 900 shares it would not let plaintiffs pay for under the sublease. In support of the defendant having converted the said 1300 shares of stock, we have the following authorities, to-wit:-

> "A corporation converts shares of stock where it totally denies a shareholder his rights as such shareholder and repudiates its obligations to him as such; as where for example, it wrongfully refuses to make a transfer of stock on the corporate books as required by statute; or unwarrantably sells or forfeits shares for a non-payment of assessments; or practically deprives a share holder of his stock by bidding it in at a pretended sale under its by-laws. In the latter case trover will lie, although the sale was in fact illegal and void, as not having been conducted in compliance with the by-laws purporting to authorize it. So, a direction by a corporation to an agent holding stock for delivery to a subscriber on payment of the subscription price, to return the stock, and the subsequent action of the board of directors in making the certificates "Forfeited," has been held to constitute a conversion of the subscriber's shares. In the case of conversion by the corporation by selling the stock without authority, the wronged owner or his assignee may maintain his action without surrendering the certificates of stock." (Numerous cases cited).

Thompson on Corporations, 2nd Addition, Vol. 4, Sec.3492.

> "There is some conflict in the authorities as to whether the valuation shall be that prevailing at the time of the actual conversion of the stock or the highest market price between the time of the conversion and the demand, or the highest price between the conversion and the trial, or the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock. *The latter rule is generally accepted by the courts, and is most strongly supported by reason and consideration of fair ess.* 'To adopt' says the Indiana Supreme Court, 'the value as existing at the time of actual conversion would enable the converting holder to make the market for the owner and deprive him of his stock, whether he so wills or not. etc. "

Thompson on Corporations, 2nd Addition, Vol. 4, Sec. 3496.

Section 8689 of the Revised Codes of Montana of 1921, on the question of damages in cases of conversion of personal property, is to the same effect as the foregoing section from Thompson on Corporations. In the instant case, at this time, we are not so much concerned with particular rules of damages as we are to show that there was evidence before the court, as to the second cause of action, to have entitled the plaintiffs to have had said cause of action submitted to the jury for their consideration. The trial

Judge in granting the defendant's motion for an instructed as to the second cause of action, clearly is a reversable error under the foregoing facts and the law applied thereto.

We submit that reversable error has been made as to both causes of action in this case, and that it therefore should be reversed and remanded for a new trial as to both causes of action.

Respectfully submitted,

H. A. TYVAND and F. E. McCRACKEN,

Attorneys for Cross-Plaintiffs in Error,

507 Silver Bow Block, Butte, Montana.